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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 370

JOHN TISNEROS,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT and BRIEF IN SUPPORT OF PETITION.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 2-1952

INDEX.

Petition for Writ of Certiorari.

	PAGE
Petition for writ of certiorari	1-6
Summary statement of the matter involved	2
Basis of this Court's Jurisdiction to Review	4
The Question Presented	4
Reasons relied on for granting the writ	5-6
Prayer for writ of certiorari	6
Brief in support of petition	6-21
Reference to Petition for statement of facts and Question presented	6
Summary of Argument	7
Argument	8-21
I. The locomotive in question was being "used" on the carrier's "line" within the purview of the Boiler Inspection Act. The Court of Appeals erred in holding the contrary	8-19
II. The utmost that can be conceded is that the question whether the locomotive was "in use" was one of fact for the jury	19, 20
III. This case is of such importance as to elicit certiorari	20, 21
Conclusion	21

Table of Cases.

Atlantic Coast Line v. Edge, 81 Ga. App. 606, 59 S. E. 2d 533 ..... 18, 19
Brady v. Terminal R. Association, 303 U. S. 10..... 5, 9
C. B. & Q. R. R. Co. v. U. S., 220 U. S. 559..... 18
Chicago, Great Western Railway Co. v. Schendel 5, 11
Cusson v. Canadian Pac. Railway Co. (CCA 2nd), 115 Fed. 2d 430 ..... 5, 7, 14, 17
Delk v. St. Louis & San. F. R. R. Co., 220 U. S. 580....5, 10
Erie R. R. Co. v. Russell, 183 Fed. 722 ..... 13, 14
Fort Street Union Depot Co. v. Hillen, (CCA 6th), 119 Fed. 2d 307 15
Interstate Circuit, Inc. v. U. S., 306 U. S. 208..... 3
Johnson v. Southern Pac. R. R. Co., 196 U. S. 362 .... 5, 12
Lyle v. Atchison, T. & S. F. Ry. Co., (CCA 7th), 177 Fed. 2d 221 ..... 4, 17
Raudenbush v. Baltimore & O. R. Co., (CCA 6th), 160 Fed. 2d 363 16
Shanks v. Delaware & L. R. R. Co., 239 U. S. 556..... 18
St. Jos. & G. I. Ry. Co. v. Moore, 243 U. S. 311..... 18
Transportation Line v. Hope, 95 U. S. 297..... 20

Statutes Cited.

Boiler Inspection Act, Title 45, U. S. C. A., Sec. 23.... 1, 8
Judicial Code, Title 28, U. S. C. A., Sec. 1254 4
Safety Appliance Act, Title 45, U. S. C. A., Secs. 1-16.. 8

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PETITION FOR CERTIORARI.

The Court of Appeals for the Seventh Circuit, deciding an important question as to the scope of the Boiler Inspection Act (Title 45, U. S. C. A. sec. 23), has held in this case that a locomotive temporarily detained at a roundhouse, not for repairs or overhauling but for stoking its fires and until time for its scheduled resumption of motion in interstate commerce, is not "in use" on the carrier's "line" within the purview of that act.

That Court treated the question as one of law, reversed a verdict and judgment for petitioner of the District Court for $42,000 and thereby made an important decision upon the constitutionally appropriate partition of the function of juries, trial judges and reviewing courts with respect to

the determination of whether a locomotive is "in use" on the carrier's "line" under the act.

The statement of the question indicates its moment to railroads and their employees throughout the country. The authorities considered in the Brief in support of this Petition emphasize the importance of the question by instancing its recurrence in the field of railroad litigation.

Petitioner seeks this Court's writ of *certiorari* in order to present this question for this Court's decision.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Court of Appeals thus stated the facts that it deemed exigent to the question presented:

> "On March 9, 1950, about 4:15 A. M. defendant's locomotive No. 3031 reached defendant's Chicago yards, after the end of its run in service from Omaha to Chicago, and was taken thence to the roundhouse and there placed in stall 32 for plaintiff's attention. He was a so-called 'fire-up' man and fire 'knocker.' He testified that he worked from 12 midnight until 8 A. M.; that it was his duty to look over a locomotive placed in a stall, ascertain whether it had fire in the fire-box, keep the fire up, if the engine was to go out on the road again, and, 'if they didn't have to use it,' 'knock the fire out.' His job, he said, was to see 'that the engine is ready to go out on the run'; to 'make it ready to go.' About 4:30 A. M., according to his testimony, some ten minutes after the locomotive had been placed in the stall, he proceeded to the performance of his duties. He observed that the steps were icy, but started to climb them, in order to reach a position where he could see the fire-box and determine what he should do. Before he arrived at that point, however, he slipped, fell and was severely injured. As he never reached the fire-box he did not know whether there was a fire. He immediately be-

came ill from his injury and was taken to a hospital; he did not know when the engine left the roundhouse. He defined stalls as places 'where they put the engines when they come in from the outside,' to get them 'off of the tracks.' No one was with him, but another workman was on locomotive 1569 occupying stall 31, next to him.

"The record is silent as to the exact time when the locomotive left the roundhouse. We do know, however, that some time after the accident, on the same day, it was inspected, and that, later in the day, it was taken to the yards, and about 8 P. M. started for Clinton, Iowa, to pick up east-bound freight."

In addition to the facts stated in the court's language above quoted, the uncontradicted evidence showed that the plaintiff began to mount the locomotive 10 minutes after it had reached the roundhouse (Tr. p. 29).[1]

While it may have been his job generally to "knock the fire out" of a locomotive that was not to be run, he testified that *with respect to this particular engine,* "My job was to look at the locomotive when it come (sic) in from outside, and if it had a fire in it I had to take care of the fire and fix it up, and fix up the water in it." He gave this testimony in response to the question "For what purpose were you going into the cab of the engine?", that is, the engine in question.

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[1] The statement in the Court's opinion that the defendant's locomotive "Reached its Chicago yards, after the end of its run in service from Omaha to Chicago" is without support in the evidence. The uncontradicted evidence shows that the locomotive was *en route* from Omaha to the defendant's Proviso yards and was detained in the roundhouse in a "stall" to make room for other locomotives on the track (Tr. 54) until, later the same day, it continued its journey to the Proviso yards. (*Answers to Interrogatories,* (Tr. 17)) The defendant failed to disclose the hour at which the locomotive resumed its run. This information was wholly within the possession of the defendant. Since the defendant failed to produce evidence which it alone had, the jury was justified in assuming that the locomotive resumed its journey very shortly after the plaintiff was injured. Cf. *Interstate Circuit Inc.* v. *U.S.,* 306 U.S. 208.

However, we do not seek this Court's writ of *certiorari* merely to review an argument as to whether the locomotive was shown to have "ended its run". The question tendered is of far broader import than would be such a narrow issue.

Therefore there is no doubt that *with respect to this particular engine,* petitioner's job was to see that a fire was burning and not to knock out a fire.

Petitioner's duties were not those of a repairman but had to do solely with keeping up or knocking out fires and watering locomotives. Thus his duties were connected with the immediate functioning of locomotives in interstate commerce and not merely with the conditioning of locomotives not immediately destined for that commerce.

The Court of Appeals, relying upon and broadening the thrust of its earlier decision in the case of *Lyle* v. *Atchison, T. & S. F. Ry. Co.,* (CCA 7th) 177 F. 2d 221, held as a matter of law that the locomotive was not being "used on its" [the carrier's] "line" within the purview of the Boiler Inspection Act and therefore set aside a verdict and judgment for the petitioner in the sum of $42,000.00.

Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

This Court has jurisdiction to review the judgment in question under section 1254 of the Judicial Code (Title 28, U. S. C. A. sec. 1254).

Rehearing in this cause was denied on July 3, 1952, and within ninety days of the filing of this Petition.

The Question Presented.

The question presented is:

> DOES THE TEMPORARY DETENTION OF A LOCOMOTIVE AT A ROUNDHOUSE FOR ATTENTION TO ITS FIRES AND UNTIL THE TIME SCHEDULED FOR ITS RESUMPTION OF MOTION IN INTERSTATE COMMERCE WITHDRAW THE LOCOMOTIVE FROM THE PURVIEW OF THE BOILER INSPECTION ACT?

Reasons Relied on for the Granting of the Writ.

This case presents the important question stated above, which has not but should be directly decided by this Court.

The decision of the Court of Appeals, although not contrary to any opinion of this Court under the Boiler Inspection Act, is probably in conflict with this Court's most nearly applicable decisions under the cognate Safety Appliance Act, all of which are analyzed in the Brief in support of this petition:

Brady v. Terminal Railroad Association, 303 U. S. 10, holding that a car was "in use" although it had finished its run while in the control of one railroad and was being inspected for acceptance or rejection by another railroad.

Delk v. St. Louis & San Francisco R.R. Co., 220 U. S. 580, holding that a car was in use which was standing on a track in the yards from 7:30 A. M. on one day until ten or eleven o'clock the next day.

Chicago, Great Western R.R. Co. v. Schendel, 267 U. S. 287, holding that a car was in use although it was motionless at the time of the accident and the employee was injured while attempting to repair a defective coupling.

Johnson v. Southern Pacific R.R. Co., 196 U. S. 362, holding that a dining car on a siding was in use although it had not yet been coupled with an engine that was to move it.

The opinion of the Court of Appeals in this case is contrary to the *rationale* of many decisions of other Courts of Appeals and State courts cited in the Brief and is in direct conflict with the *rationale* of *Cusson* v. *Canadian Pacific Railway Co.,* (C. C. A. 2d) 115 F. 2d 430. In that case, Judge Learned Hand said,

> "The argument must therefore be that a 'use' of the brake was not a 'use' of the car, which is not only

verbally untrue but which disregards the whole underlying principle of the act."

The Court of Appeals in the instant case has necessarily held that petitioner's "use" of the ladder for the purpose of fueling a locomotive was not a "use" of the locomotive. This direct conflict between circuits, in one of which it is held that the use of an appurtenance to a car is necessarily a use of a car and in another of which that proposition is denied, should elicit *certiorari*.

Prayer for the Writ of Certiorari.

Wherefore, petitioner prays this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

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BRIEF IN SUPPORT OF THE PETITION.

Reference to Petition for Statement of the Facts and of the Questions Presented.

The facts are stated and the question sought to be presented is delineated in the Petition for *Certiorari*. Therefore reference to that petition for Statement of the Facts and of the question presented is respectfully made.

SUMMARY OF ARGUMENT.

I.

The locomotive in question was being "used" on the carrier's "line" within the purview of the Boiler Inspection Act. The Court of Appeals erred in holding the contrary.

The locomotive was on the defendant's track, and therefore upon its "line", for stoking prior to scheduled resumption of actual motion in interstate commerce.

If no one else was "using" the locomotive, petitioner was "using" the ladder and therefore "using" the locomotive.

The decision of the Court of Appeals in this case is directly contrary to the decision of the Court of Appeals in the Second Circuit in the *Cusson* case, (*Cusson* v. *Canadian Pacific Railway Co.*, (C. C. A. 2nd), 115 Fed. 2d 430) in which case Judge Hand said:

> "The argument must therefore be that a 'use' of the brake was not a 'use' of the car, which is not only verbally untrue but which disregards the whole underlying principle of the act."

The decision in this important case is contrary to the conception of "use" enunciated by this Court and various Courts of Appeals under the Safety Appliance Act.

To the extent that the question of what constituted "use" depended upon how soon the locomotive was scheduled to be put in motion, the question was for the jury and not for the Court.

The case is of such importance as to elicit *certiorari*.

ARGUMENT.

I.

The locomotive in question was being "used" on the carrier's "line" within the purview of the Boiler Inspection Act. The Court of Appeals erred in holding the contrary.

The applicable provision of the Boiler Inspection Act is as follows (Title 45, U. S. C. A. sec. 23):

> "It shall be unlawful for any carrier *to use or permit to be used on its line* any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (Emphasis supplied)

The phrase "use or permit to be used on its line" is the critical phrase in this case.

The Court of Appeals correctly perceived that the scope of the Boiler Inspection Act, like that of the cognate Safety Appliance Act (Title 45 U. S. C. A., secs. 1-16) with which the Boiler Inspection Act is in *pari materia,* is less broad in its purview than is the Federal Employers' Liability Act in that, under the Boiler Inspection Act and the Safety Appliance Act, the defective locomotive or a car must be in use, whereas under the Federal Employers'

Liability Act, it is only necessary that a part of the employee's duties relate to interstate railroading and it is immaterial whether he is injured by defects in a car that is being "used" or is wholly out of service.

But the Court of Appeals clearly erred in holding that the locomotive in question, which was being detained in a roundhouse only until the scheduled time for the resumption of its motion was not being "used" on the carrier's "line" at the time that petitioner was injured.

While this Court has made no pronouncement upon this or similar questions under the Boiler Inspection Act, it has decided a number of cases under the cognate Safety Appliance Act that are directly contrary in their teachings to the holding of the Court of Appeals in this case.

We thus summarize the facts and holding of this Court in cases under the Safety Appliance Act with pertinent quotations stating the *ratio decidendi* in the margin:

Brady v. Terminal R. Association, 303 U. S. 10.

Plaintiff, a car inspector, was injured while inspecting one of a string of cars brought to the defendant's railroad yard. The car was on the receiving track and the purpose of the inspection was to determine whether the car would be accepted by another railroad, of which latter railroad the plaintiff was an employee. It was contended that, the car having come to rest as far as the transferor railroad was concerned and not having been accepted by the transferee railroad, it was not in "use" or "service." This Court held that *even though the car was not only at rest but was being detained for the purpose of such in-*

spection as would determine whether it would be accepted for transit, it was "in use" by the transferor railroad.[1]

Delk v. St. Louis & San Francisco R.R. Co.
220 U. S. 580.

Plaintiff was injured by a defective safety appliance on a car that had been "bad ordered" *and scheduled for repairs.* The car, however, was set aside on a track in the yards from 7:30 A. M. on the third day of the month until 10 or 11 o'clock the next day. The car was held to be in "use" and recovery was sustained.

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[1] The Court said at page 617:

"The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The 'use, movement or hauling of the defective car,' within the meaning of the statute, had not ended when petitioner sustained his injuries. (Citing authorities.) The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. (Citing authorities.) The car in this instance had not been withdrawn from use. (Citing authorities.) The car was still in use, though motionless. (Citing authorities.) In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute.

"The question then is whether the responsibility of the Terminal Association, which brought in the car, had ended. We think that question is answered by the undisputed fact that it was placed by the Terminal Association on the receiving track to await inspection and acceptance by the Wabash.

"The Wabash had not accepted it. The jury, which found for petitioner, were instructed that as a condition of that verdict it was necessary for them to find that petitioner 'was required to go upon said car for the purpose of inspecting the equipment thereon and of accepting or rejecting the said car on behalf of his employer, the Wabash Railway Company.' We cannot agree with the view, expressed in the opinion of the state court in reversing the judgment, that 'granted that the cars were still (in the legal sense) in the possession of the Terminal,' it might still be held that 'the right of control' had passed to the Wabash. As the Wabash had not accepted the car, the Wabash had not assumed control and petitioner was examining the car in order to determine whether the Wabash should assume control.

"As the car had not been withdrawn from use and was still in the possession of the Terminal Association, its statutory obligation continued and the question is whether that duty was owing to petitioner."

Chicago, Great Western Railway Co. v. Schendel,
267 U. S. 287.

The train had broken down and a brakeman had gone between cars, to "repair" as he said, a defective coupling. The car was motionless at the time of the accident. "The Railway Company," this Court said, "contends that the evidence did not bring the case within the Safety Appliance Act or warrant the submission to the jury under that Act; the argument being, in substance, that the car, *being motionless at the time of the accident* was not then in use. . . . "

Thereupon the court said, "We cannot sustain this contention." The Court held that the fact that the car was motionless because it was in need of repairs did not abstract it from the "use" contemplated by the Safety Appliance Act.[2]

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[2] "The Railway Company contends that the evidence did not bring the case within the Safety Appliance Act or warrant the submission to the jury under that Act; the argument being, in substance, that the defective car, being motionless at the time of the accident was not then in use; that Goneau was not engaged in any coupling operation or car movement, but was doing repair work at the place where the defect was first discovered, which was permitted by the Act of 1910, and whose risk he assumed; and that the defective condition of the carrier iron was merely a condition presenting the occasion for making the repairs, and not a proximate cause of the accident.

"We cannot sustain this contention. Under the circumstances indicated it is clear that the use of the defective car had not ended at the time of the accident, although it was then motionless. A defective car is still in use when it has been moved with the train from the main line to a siding, to be cut out and left so that the other cars may proceed on their journey. *Chicago G. W. R. Co.* v. *Schendel*, 267 U.S. 287, 291, 69 L. ed. 614, 617, 45 Sup. Ct. Rep. 303. And so it is while still in a section of the train on the main line, to be coupled up and proceed on its journey as a part of the train. And see *Baltimore & O. R. Co. v. Tittle* (CCA 6th), 4 F. 2d 818, 820."

Johnson v. Southern Pacific R.R. Co. 196 U.S. 362.

The then Circuit Court of Appeals held that a dining car on a siding was not in use and that therefore the plaintiff, who was injured while attempting to uncouple the engine from a train and to couple it to the motionless dining car, was not entitled to recover under the Safety Appliance Act. The then Circuit Court of Appeals reasoned that inasmuch as the car was still, as it were, in storage upon the track and had not commenced its interstate motion, it was not in "use." This Court reversed.[3]

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[3] "Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening.

"The presumption is that it was stocked for the return; and as it was not a new car, or a car just from a repair shop, on its way to its field of labor, it was not 'an empty,' as that term is sometimes used. Besides whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in *Voelker* v. *Chicago, M. & St. P. R. Co.*, 116 Fed. 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'

"Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and *Coe* v. *Errol*, 116 U.S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, is cited as supporting that contention. In *Coe* v. *Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before the transportation had begun.

"The disinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

"Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

Likewise pertinent are many decisions of Federal Courts of Appeals in the question holding that a car is in "use" even though it is motionless and temporarily withdrawn from transit.

Erie R.R. Co. v. Russell, 183 Fed. 722.

In this case an *empty* car with a defective coupler *was left in a switchyard over night.* An employee was killed when he attempted to adjust a knuckle in a coupling apparatus.

The following language of the Court (p. 724) is important:

> "The first phase of this action is whether the car with the defective coupler was, at the time of the accident, in use within the meaning of the amended act. It is pointed out that the car was not being hauled at the time of the accident, but was standing upon a switch track for the insertion of the knuckle in the coupling apparatus, and it is contended that it was not then being used within the contemplation of the statute. We think upon the authority of *Johnson* v. *Southern Pacific Co.,* 196 U.S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that this contention is not well founded. The car with the defective coupler was not withdrawn from use. Although billed to the repair shop it was not sent there, nor was it sent to any place used especially for making repairs. The insertion of the knuckle was a simple matter. The car was stopped only temporarily, and it was intended to couple it to the other cars as soon as repaired. These facts seem clearly to distinguish this case from those cases cited in the defendant's brief where accidents occurred when cars had been sent to repair shops or placed upon dead tracks used for repair purposes."

The *Russell* case affords a basis for a cogent argument that the car was not in use. *It was scheduled for repairs.* It was empty, so it was not being "used" to house or

store freight that the railroad was bound to transport. It was motionless.

Inasmuch as the *Russell* case was decided under the Safety Appliance Act and the instant case was decided under the Boiler Inspection Act, the decisions may not be in technical conflict. Nevertheless, the Court's opinion in the *Russell* case is so repugnant to the logic of the Court's opinion in the instant case as to create a virtual conflict of authorities on the question whether a locomotive or car that is standing over night is "in use" within the purview of these two companion acts.

Cusson v. Canadian Pacific Railway Co.,
(C. C. A. 2nd), 115 F. 2d 430.

Plaintiff's employer desired to uncouple two motionless cars and to pull one of them away from the other. The plaintiff set the brake on one of the cars, which was not intended for movement, so that it would not drift when the slack was taken up between it and the car that was intended to be moved. The brake was defective, the car drifted, and the plaintiff was injured. The railroad contended that, the car being motionless and upon a siding, it was not in "use". The Court of Appeals for the Second Circuit held, per Judge Hand, that "The fact that the Delaware car was not in motion, does not of course mean that it was not in 'use' ". The following language is exceedingly pertinent:

> "The fact that the Delaware car was not in motion does not of course mean that it was not in 'use' (citing authorities), but it is arguable whether the only 'use' of it was not the Boston & Maine's which was in possession of it at the time and was to take it to its destination. *Brady* v. *Terminal Railroad Association*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614, does not help solve that problem, for the car might be in

the 'use' of both roads, the Boston & Maine and the defendant. We think it was in 'use' by the defendant, though we have not found anything in the books close enough to cite. In construing this statute, like any other, we are to bear in mind its purpose which was primarily to secure the safety of railroad employees; it was to minimize the dangers of a calling made dangerous in part by defects in the equipment which the men were required to use. Certainly the defendant 'used' the brake upon the Delaware car for its own purposes; that was necessary to prevent the Delaware car's 'drifting' down the track after the Boston & Maine car had been uncoupled. **The argument must therefore be that a 'use' of the brake was not a 'use' of the car, which is not only verbally untrue but which disregards the whole underlying purpose of the act.**" (Boldface ours.)

Fort Street Union Depot Co. v. Hillen,
(C. C. A. 6th), 119 Fed. 2d 307.

Plaintiff was killed when he fell from a car that was *standing on a siding*. His fall was due to a defective grab-iron upon the car. The railroad contended that since the car was standing on a siding, it was not "in use." The Court rejected the contention.

It is impossible to distinguish the *Fort Street Union Depot Company* case from the instant case upon any rational ground. In the *Fort Street Union Depot* case, the car was standing on a siding, at rest until time for its scheduled motion. In the instant case, the locomotive was standing in a roundhouse.

In the *Fort Street Union Depot* case, the Court recognized that the act is "remedial and humanitarian in purpose and calls for liberal construction."

Raudenbush v. Baltimore & O. R. Co.,
(C. C. A. 6th), 160 Fed. 2d 363.

A train of cars had been uncoupled and was motionless in a railroad yard. The cars started to roll and decedent was injured when he fell, as did petitioner in the instant case, from a ladder that was encrusted with ice. The Court of Appeals held that both the train of cars, although motionless, and the engine, which had moved away but had ceased its motion and which was insufficiently lighted, were "in use" within the purview of the Federal Safety Appliance law.

In the instant case, the Court of Appeals said that the locomotive in question had finished its run. But the naked facts, uncolored by the characterization implicit in such phrases as "finished its run", are that the locomotive in question was brought into a roundhouse, that it was petitioner's duty to see that there was a fire in the locomotive, and that the car was destined to continue its transit to the Proviso yards. Unless a train, car or locomotive has a regular schedule e.g., the schedule of the Twentieth Century Limited between New York and Chicago, it is difficult to say when the train, locomotive or car has "finished its run" as long as it is moving or standing on a track and intended to continue its transit in the reasonably near future.

But we submit that it makes no difference when a train may be said to have "finished its run". As long as it is on a track to be fueled for scheduled movement, it is, we submit "in use" on the "line".

Lyle v. Atchison, T. & S. F. Ry. Co., (C. C. A. 7th), 177 Fed. 2d 221, criticized and distinguished.

The Court posited its instant decision on its earlier decision in *Lyle* v. *Atchison, T. & S. F. Ry. Co.*, 177 Fed. 2d 221.

The *Lyle* case is distinguishable. Candor to the Court compels us to state, however, that we think it should be overruled and not distinguished.

In the *Lyle* case, the plaintiff "completed his duties including as we have seen, placing sand, oil and water in their proper places, filling the lubricators, and in general doing anything else the engine needed to have done in order to put it in condition for use. . . ." Whether there was thereafter any such use is not shown by the record.

In the *Lyle* case, no "use" of the locomotive subsequent to the plaintiff's injuries was shown. In the instant case, the engine was en route to, and the same day moved to, the Proviso yards of the defendant. The petitioner was mounting the engine when he was injured. He was therefore "using" the steps. If no one else was "using" the steps and therefore "using" the locomotive, *at least petitioner was "using" them.*

In *Cusson* v. *Canadian Pacific Railway Co.*, (C. C. A. 2d), 115 Fed. 2d 430, already discussed, Judge Hand said,

"The argument must therefore be that a 'use' of the brake was not a 'use' of the car, which is not only verbally untrue but which disregards the whole underlying purpose of the act." To sustain the instant case, it must be similarly argued that petitioner was "using" the steps of the locomotive but was not "using" the locomotive. These considerations would suffice to distinguish the *Lyle* case.

However, we submit that the *Lyle* case is plainly wrong. It holds that mere temporary detention of a locomotive in

a roundhouse between runs is not a "use" of the locomotive. It is contrary to all the above cited decisions declaring that locomotives are cars "in use" even though they are at rest pending their scheduled motion.

The opinion in *Lyle* case, of which the author was the judge who wrote the opinion in the instant case, utters a doctrine that, if engrafted on the Safety Appliance Act, will impart to that act a narrow scope, reminiscent of the strict interpretation of the early Federal Employers' Liability Act that for many years denied the benefits of that act to thousands of injured railroad employees, leaving them in a penumbra of uncertainty as to whether their rights were under the act or under state workmens' compensation acts or state common law negligence laws. (Cf. the narrow view expressed in *Shanks* v. *Delaware and L. R. R. Co.*, 239 U. S. 556, which gave incidence to uncertainty in the scope of the act that led to so much tragedy for injured railroadmen and their families.) The doctrine has already spread to Georgia. Cf. *Atlantic Coast Line* v. *Edge*, 81 Ga. App. 606, 59 S. E. 2d 533 (1950), which follows the *Lyle* case.

Moreover, if this interpretation prevails, the Boiler Inspection Act will have a narrower scope than the companion Safety Appliance Act, which, notwithstanding the fact that it imposes absolute liability upon the carrier, has been held applicable to cars detained on a railroad track for temporary stoppage, even when such stoppage is for the purpose of repairs, pending resumption of movement.

If petitioner had been injured by a defective grabiron on the locomotive or its tender, he would have clearly been within the purview of the Safety Appliance Act, which applies to locomotives as well as cars (*C. B. & Q. R. R. Co.* v. *U. S.*, 220 U. S. 559; *St. Jos. & G. I. Ry. Co.* v. *Moore*, 243 U. S. 311) and which, under the cases heretofore cited,

applies to cars, hence to locomotives, notwithstanding their temporary stoppage on sidings or in yards prior to resumption of movement Hence the opinion in this case propounds the anomoly of holding petitioner without the purview of the Boiler Inspection Act although the very locomotive from which he fell was within the ambit of the protection afforded by the companion Safety Appliance Act.

Atlantic Coast Line v. *Edge,* 81 Ga. App. 606, 59 S. E. 2d 533, spawned by the *Lyle* case, and the instant case largely nullify the enlightened and humanitarian intendment of this beneficient legislation. This case should be reversed and, we submit, the *Lyle* case and *Atlantic Coast Line* v. *Edge* should be overruled.

II.

The utmost that can be conceded is that the question whether the locomotive was "in use" was one of fact for the jury.

Ordinarily, of course, the exposition of the meaning of a term in a statute is purely a matter of law.

Where, however, there arises from the evidence uncertainty as to critical facts upon which the application of the statute must depend, the question becomes one for a jury.

In the instant case, the respondent did not see fit to introduce evidence of the exact time when the locomotive reached the roundhouse although it had such evidence in its possession.

The engine was concededly detained only temporarily at the roundhouse. But how long it may reasonably be presumed to be detained there was a question for the jury to consider in the light of the respondent's refusal to produce evidence of the time that it left.

To the extent, therefore, that the question of whether a locomotive was "in use" depends upon whether it is intended to be moved comparatively soon or in the comparatively remote future, the evidence being unclear, the question was one for a jury.

The plaintiff's uncontradicted testimony was that the locomotive was "in use". While it may be argued that this was testimony of a witness as to the meaning of the language of an act of Congress, the phrases such as "in use" and "in service" are terms of art in railroad parlance. Therefore those persons who know their usual significance within the industry are competent to testify to them. Cf. *Transportation Line* v. *Hope,* 97 U. S. 297, reversing for failure to receive the opinion evidence of a railroad man as to whether a certain operation was reasonably safe.

The Court of Appeals rejected this important consideration in treating the question as one of law.

III.

This case is of such importance as to elicit certiorari.

We are mindful that in the matter of granting or denying *certiorari,* the importance or lack of importance of the question sought to be presented is a paramount consideration.

The following reflections are therefore pertinent:

In every state of the Union, in every day of the year, locomotives or cars are temporarily detained on sidings, in yards or in roundhouses. Injuries as a result of defective conditions of these cars are frequent.

It is important that railroads, employees and lower Federal courts know whether such locomotives and cars are

"in use" or not "in use" within the purview of the Boiler Inspection Act and the companion Safety Appliance Act.

The resolution of that question will not require the Court to canvass a complex of facts or to rehearse the substance of voluminous evidence.

This case presents a simple, clear and very important question of railroad law which has not been but should be decided by this Court.

Conclusion.

For the reasons suggested in this Brief, it is respectfully submitted that this Court should grant *certiorari* and reverse the judgment of the Court of Appeals in this case.

Respectfully submitted,

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